

No. 7426

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 5

OCTOBER TERM, 1934

O. KRAFT,

Appellant,

vs.

NATIONAL SURETY COMPANY, a corporation,
H. P. SULLIVAN, E. H. BOYER and A. F. STOWE,

Appellees.

BRIEF FOR THE APPELLEES H. P. SULLIVAN,
E. H. BOYER AND A. F. STOWE.

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QUESTION.

The question presented for consideration by this appeal is whether or not the District Court erred in granting judgment on the pleadings, on motion of the defendants where the plaintiff had failed for twenty-six months to reply to an answer or deny new matter set up by way of an affirmative defense to an action for malicious prosecution. A rule of Court required such pleading to be filed in five days. No Court order was ever made extending the time and no leave was granted by the Court to file replies.

The plaintiff set up a state of facts which if undisputed would entitle it to a recovery. The defendants denied these allegations and set up facts by way of special defense which if proven would overcome the facts set out in the petition. In other words, if the plaintiff proved all he alleged and the defendant proved all it alleged, the Court at the conclusion of the testimony would be compelled to direct a verdict in favor of the defendants or enter a judgment in favor of the defendant.

In order that the pleadings might be properly tested it is necessary to set out the gist of the complaint and the gist of the answer including the special defenses.

In order to see the situation at a glance the following statement is necessary:

On March 16, E. H. Boyer, a United States Marshal and one of the appellees, swore to a violation of the Alaskan Game Law by the appellant (R. 8) and on the same date a warrant of arrest (R. 9-10) issued by the United States Commissioner, A. F. Stowe, an ex officio justice of the peace, another appellee, and plaintiff was arrested and furnished bond (R. 4). Trial was set for March 17, 1928 and continued until March 19 and until March 30, 1928, when the prosecution was abandoned (R. 3). Plaintiff alleges arrest was result of malice and conspiracy to injure plaintiff and asks \$16,000 damages (R. 2-3). The complaint alleges foregoing suit filed on December 26, 1930.

National Surety Company (R. 13-19) on July 11, 1931, H. P. Sullivan (R. 21-27) on July 8, 1931, E. H. Boyer, and A. F. Stowe (R. 29-35) on July 8, 1931, filed separate answers and denied any conspiracy or malice or that the defendant had been damaged, and by way of affirmative defense set up that E. H. Boyer, Deputy United States Marshal, for that jurisdiction, was reliably informed that a certain alien non-resident of the United States of America had bought and sold and was illegally engaged in the buying and selling of skins of fur bearing animals at Kodiak, Alaska, without having first obtained a license as required by the provisions of the Alaskan Game Law, and that said alien person had sold at least one of said skins of fur bearing animals to plaintiff with the full knowledge on the part of the plaintiff that said person had bought and sold and was engaged in the buying and selling of the skins of fur bearing animals, illegally, and purchased by the plaintiff knowingly and unlawfully, and defendant Boyer honestly and in good faith and upon proper and sufficient cause believing that the Alaskan Game Law was being violated by said plaintiff, requested A. F. Stowe, United States Commissioner, to make an inspection of plaintiff's records of purchases of furs; that the defendant Stowe's request was refused by plaintiff and by plaintiff's clerk; that on the following day, March 16, 1928, E. H. Boyer, Deputy United States Marshal, being informed by Stowe of plaintiff's refusal, himself requested permission of plaintiff to inspect his record of fur purchases, which plaintiff again declined and thereupon said plaintiff proceeded with defendant Boyer to the

office of the United States Commissioner where Boyer in good faith, believing that he had a right under the law to inspect upon demand or request, the plaintiff's said record of furs purchased by plaintiff, filed and made an oath to a complaint in a criminal action against plaintiff and thereupon A. F. Stowe as Commissioner and Justice of the Peace, having read said complaint and acting honestly and in good faith as a judicial officer and in the performance of judicial duties and within the judicial authority and discretion imposed and conferred upon him, issued said warrant; that all of said defendants entertained very friendly feeling toward plaintiff and did not wish to cause him any harm or injury whatever and were not actuated by malice, ill will or enmity.

On *August 1st, 1931*, plaintiff filed separate demurrers to answers of National Surety, H. P. Sullivan and Boyer and Stowe (R. 36, 37, 38). On *September 23, 1931*, demurrers overruled (R. 38). On *May 20, 1932*, this suit on defendant's motion was transferred to the Valdez Alaska Docket for trial (R. 58). On *November 22, 1933*, twenty-six months after the overruling of plaintiff's demurrer to the answers of the several defendants, the defendants moved for judgment upon the ground that no answer or denial of any kind had been filed to the affirmative allegations set forth in each of the answers filed by the defendants (R. 45) and on the same date (November 22, 1933), the plaintiff filed replies to the separate answers of the National Surety Company (R. 38, 39, 40) of E. H. Boyer and A. F. Stowe (R. 43, 44), and Sullivan.

On November 23, 1933, the Court granted the motion of the defendants for judgment upon the pleadings and found "from an inspection of the Amended Complaint and answers of the several defendants filed in said cause, that the plaintiff has failed to reply to the new matter and affirmative defense set forth in the answer of defendants, which new matter and affirmative allegations constitute a defense to said action" (R. 46, 47).

STATUTES INVOLVED.

Section 336, Compiled Laws of Alaska, entitled "Game Laws", is as follows, so far as here pertinent:

"Enforcement. * * * Any marshal, deputy marshal, or warden in or out of Alaska may arrest without warrant any person found violating any of the provisions of this act or any of the regulations herein provided, * * *".

Regulation No. 21 under the above-entitled Law is as follows:

"Each licensed fur farmer or fur dealer, including stores operated by Missions or otherwise for native Indians, Eskimos, or half-breeds, shall comply with the provisions of all territorial laws relating to fur farmers and fur dealers, and, at all reasonable hours, shall allow any member of the Commission, any game warden, or any authorized employee of the United States Department of Agriculture to enter and inspect the premises where operations are being carried on under these regulations, and to inspect the books and records relating thereto."

Section 895, Compiled Laws of Alaska, is as follows:

“The answer of the defendant shall contain

“First. A general or specific denial of each material allegation of the complaint controverted by the defendant or any knowledge or information thereof sufficient to form a belief.

“Second. A statement of any new matter constituting a defense or counterclaim is ordinary and concise language without repetition.”

Section 901, Compiled Laws of Alaska, is as follows:

“If the answer contain a statement of new matter, constituting a defense or counterclaim, and the plaintiff failed to reply or demur thereto within the time prescribed by law or rule of the court, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it he may have a jury called to assess the damages.”

Rules of the District Court for the Territory of Alaska,
Third Division, Involved Herein.

Rule No. 27:

“Unless some definite time is fixed by statute or special order or rule of court, a party against whom a pleading is filed must respond thereto by reply or other pleading within five days from the time the same is served on him or service waived by him.”

Rule No. 12:

“Cases which have been pending in this court for more than one year without any proceeding having been taken therein may be dismissed as of course, for want of prosecution, by the court on

its own motion at a call of the Calendar. Such cases may also be dismissed for want of prosecution at any time by motion of any party upon notice to the other parties.”

BRIEF AND ARGUMENT.

Rule No. 27, *supra*, of the District Court grants five days within which to plead, unless some definite time is fixed by statute, or special rule; and Rule No. 12, makes any case pending for more than one year without any proceedings eligible to be dismissed for want of prosecution upon motion and notice to the opposite party. In this case the record fails to show any order extending the time beyond five days from September 23, 1931 (R. 38), the date on which the demurrer was overruled, and as opposed to any such presumption that the time for filing a reply to the various answers had been extended, the Court found in the judgment on *November 23*—twenty-four hours after the transcript shows the various replies to have been filed in Court—that *there had been no filing*. It is therefore not a violent presumption to assume that the Court declined to permit the filing of said replies and rendered judgment.

Every presumption is indulged in favor of the validity of any judgment, regular on its face, unless it is overcome by matters apparent in the record. With Rules 12 and 27 it is apparent that the Lower Court enforced these rules.

It is submitted that the record in this case fails to show an extension of time beyond five days from the

date the demurrers were overruled. For the appellant to prevail in this action there should be an affirmative showing that an extension *was* granted or that the Court permitted the filing out of time—an abuse of discretion on the part of the Court—in refusing to permit it to file answers two years and twenty-five days out of time.

In the face of all this the appellant insists the replies *were* filed. Appellant also contends that the matter set out in the complaint was a sufficient denial of the special defense. We submit this is not the case, and that the finding in the judgment is conclusive that no replies were allowed to be filed out of time and that with the special defense uncontroverted, it would have been a farce to have permitted a trial which demanded a finding for the defendant. It is respectfully submitted no error is shown in granting judgment on the pleadings and that the judgment of the lower Court should be affirmed.

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